

UNITED STATES SENATE COMMITTEE ON FINANCE

HEARING ON
“TAX REFORM: WHAT IT COULD MEAN FOR TRIBES AND TERRITORIES”

TESTIMONY OF
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Good morning, Chairman Baucus, Ranking Member Hatch, and other distinguished members of the Committee.

My name is Lindsay Robertson and I am the Judge Haskell A. Holloman Professor of Law and Faculty Director of the Center for the Study of American Indian Law and Policy at the University of Oklahoma College of Law. I have been a professor of Federal Indian Law for more than 20 years. From 2000-2010, I served as Special Counsel on Indian Affairs for Oklahoma Governors Frank Keating and Brad Henry. It is an honor to have been invited to address this committee on this important topic.

I would like first to place the issue of tax policy and tribal economic life in historical perspective, then address potential reforms. While there are a number of areas in the Internal Revenue Code that could be improved to better serve tribes, input on which others, including President Porter and various organizations, will be providing the Committee, I will highlight two: the “essential government function” limitation on tribal tax-exempt bonding and current limitations on the application of the General Welfare Exclusion.

Tribal governments in the United States are both pre-constitutional and extra-constitutional. That is, they existed before European settlement and they operate apart from and not directly subject to the Constitution. The U.S. Supreme Court has characterized tribes as “domestic dependent nations” – nations, and not simply aggregations of individuals sharing a particular heritage, but domestic nations, not foreign nations, and therefore having a special relationship to the United States. In the same decision – *Cherokee Nation v. Georgia* – the Court described that relationship as being like that of “a ward to his guardian.” In 1886, in *Kagama v. United States*, the Court recognized a substantive legal consequence to this relationship. As guardian, or trustee, the United States has power to legislate over Indian affairs, but also the responsibility to exercise that power to the ultimate benefit of the tribes.

In furtherance of its trust responsibility, since *Kagama* the United States at numerous stages has acted proactively to address what it perceived to be problems in tribal economic development. These efforts have been bipartisan. For example, the Indian Reorganization Act of 1934, President Franklin Roosevelt’s key tribal legislation, established tribal economic development funds, authorized the creation of tribal corporations, and provided tribes the means to reestablish jurisdiction over lands lost during the allotment era of the late 19th Century, when collectively-

owned tribal lands were divided up and sold. The Self-Determination and Education Assistance Act of 1975, a Republican initiative, entrusted tribal governments with control over federal programs operating within their communities, in part on the theory that only in that way would these programs be truly accountable to the people they served.

Whether to comply with a trusteeship obligation grounded in law, or morality, or because it simply makes economic sense, the Congress has frequently employed its power to legislate tax policy to facilitate tribal economic development.

I would like now to say a few words in support of the two specific reforms I mentioned when I began my remarks.

The first is the elimination of the “essential government function” limitation on tribal tax-exempt bonds found in 26 U.S.C. § 7871. Tribes are now and have always been handicapped under federal law when it comes to the raising of capital for economic development activities. Since the Trade and Intercourse Act of 1790, tribal land sales without federal authorization have been invalid under federal law. While this restriction undoubtedly led to the retention of tribal lands that might otherwise been lost, it had the unintended effect of making tribal lands unavailable as security for conventional loans. Free alienability of such lands is not the solution as long as tribal jurisdiction is closely tied to land tenure. Instead, the solution must involve the creation of compensatory capital-generation devices. Authorizing tribes to issue tax-exempt bonds was a step in the right direction. However, the “essential government function” limitation imposed on the use of funds raised through such bonding limited its utility as an engine for economic development. It is worth noting that the “essential government function” limitation is not applied to limit the use of funds raised through tax-exempt bonding by states and municipalities. The elimination of the limitation on tax-exempt bonding by tribes would free tribes to raise capital otherwise unavailable to them and make it possible for them responsibly to create their own solutions in today’s difficult economic times.

A second important tax reform involves the General Welfare Exclusion, which is currently interpreted to apply only to tribal means-tested programs. Tribal governments commonly provide benefits to their members including health, education and other services. Some of these, including, for example, language education, are considered essential for the preservation of tribal culture. When the United States taxes these benefits, tribes are handicapped in the services they can provide. Presently, it appears that not only are these services being taxed, they are being audited at a disproportionate rate. It is difficult to imagine that the revenue generated by the taxation of these services outweighs the harm done to tribal governmental operations and cultural preservation. Moreover, where services are provided to make up for deficiencies resulting from adverse conditions not of the tribes’ making or, indeed, to further federal policy objectives, taxing and auditing them appears to me inconsistent with the requirements of the federal trust responsibility.

I thank you for holding this hearing and for allowing me the opportunity to appear. I would be happy to answer any questions.

Thank you.